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IN THE
SUPREME COURT

OF THE
STATE OF UTAH

STATE OF UTAH

ROBERT BELCHER

Appeal From

District Court of
County, Honorable

JOHN D. O'CONNELL

Legal Defender

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Salt Lake City, Utah 84111

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

ROBERT BELCHER,

Defendant-Appellant.

Case No.

12077

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with assault on a guard with malice aforethought while serving time in the State Prison. Pursuant to Utah Code Ann. § 77-65-1 (Supp. 1969), appellant requested final disposition of the assault charge.

Before the period for bringing the case to trial had elapsed, the State moved for a continuance, which motion was granted.

Appellant withdrew his plea of not guilty and entered a plea of guilty to the crime of assault on a guard with a deadly weapon but without malice aforethought. Judgment was based on the guilty plea of the lesser included crime.

Appellant appeals from the judgment on the grounds that the trial court was without jurisdiction of the matter pursuant to Utah Code Ann. § 77-65-2 (Supp. 1969).

DISPOSITION IN THE LOWER COURT

On December 8, 1969, which was within ninety days of appellant's request for final disposition, the Third District Court, the Honorable D. Frank Wilkins, presiding, granted the State's motion to extend the time for disposing of case at bar pursuant to Utah Code Ann. § 77-65-1 (Supp. 1969).

Subsequently, appellant entered a guilty plea to the crime of assault on a guard without malice aforethought, a lesser crime than that with which he was charged, and was sentenced to the Utah State Prison for the indeterminate term as provided by law, the sentence to commence at termination of prior sentence being served.

RELIEF SOUGHT ON APPEAL

Respondent submits that the judgment of the trial court was properly entered while court had jurisdiction of the matter and that therefore, the judgment should be affirmed.

STATEMENT OF FACTS

Appellant was sentenced and committed to the Utah State Prison in 1967 for the crime of burglary in the second degree. While serving the burglary sentence, appellant stabbed a guard and was charged with the crime of assault with malice aforethought (R. 6).

On September 19, 1969, appellant filed notice and request for final disposition of the assault charge pending

against him, pursuant to Utah Code Ann. § 77-65-1 (Supp. 1969) (R. 10).

On December 8, 1969, which was within ninety days of appellant's request for final disposition, the State made a motion to continue the case to some date beyond the ninety day period. The court granted the motion and set trial for January 26, 1970.

The prosecutor indicated that he would be happy to try the case within the ninety day period, but circumstances of the case made a continuance necessary. The difficulties in handling the case within the ninety day period involved appellant's recent notice of insanity plea, and a crowded calendar. The court was very much aware of the statute requiring a disposal of a matter within ninety days from request for disposal, unless good cause is shown for continuance (R. 39). The court found good cause for a continuance and set the trial date beyond the ninety day period.

Subsequently, appellant entered a plea of guilty to the crime of assault on a guard with a deadly weapon but without malice aforethought, a lesser crime than that with which appellant was originally charged. Appellant was sentenced to serve an indeterminate term in prison, the sentence to commence at the conclusion of present sentence (R. 26).

ARGUMENT

POINT I.

THE TRIAL COURT HAD JURISDICTION BEYOND NINETY DAYS FROM FILING OF RE-

QUEST FOR DISPOSITION AND DID NOT ERR IN SENTENCING DEFENDANT IN THAT PURSUANT TO UTAH CODE ANN. § 77-65-1 (SUPP. 1969), THE COURT GRANTED A NECESSARY AND REASONABLE CONTINUANCE FOR A GOOD CAUSE.

The issue revolves around Utah Code Ann. §§ 77-65-1 and 77-65-2 (Supp. 1969). The statutes provide in part:

“ . . . that for a good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.” Utah Code Ann. § 77-65-1 (Supp. 1969). (Emphasis added.)

“In the event that the action is not brought to trial within the period of time as herein provided, no court of this state shall any longer have jurisdiction thereof, nor shall the untried indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.” Utah Code Ann. § 77-65-2 (Supp. 1969).

The Utah Supreme Court has ruled that the legislature, by passing these statutes, intended to put the burden of compliance upon the prosecutor. However, the prosecutor, within the ninety day period, for good cause, may move for a continuance beyond the period proscribed. *State v. Wilson*, 453 P. 2d 158, 22 U. 2d 361 (1969).

The Utah high court stated that the purpose of the statute is “to more precisely define what is meant by ‘speedy trial’ as that term is used in the constitutions of the various states.” *Id.* at 363.

The United States Supreme Court:

“ . . . has consistently been of the view that ‘[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.’ [Citation omitted.] ‘Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances . . . The delay must not be purposeful or oppressive.’ [Citation omitted.] ‘[T]he essential ingredient is orderly expedition and not mere speed.’” *United States v. Ewell*, 383 U. S. 116, 120 (1966).

The reasoning of the United States Supreme Court concerning speedy trial may be applied to case at bar. Circumstances justified continuance; announcement by appellant of his insanity defense and the crowded calendar justified continuance to a reasonable date. No rights of defendant were prejudiced. The delay was not purposeful or oppressive. There was orderly expedition. Request for continuance was reasonably made and was in compliance with the appropriate statute.

The case at bar can be distinguished from *State v. Wilson*, *supra*. In case at bar, the prosecutor moved for a continuance beyond the period proscribed. The motion was made within the ninety day period, and was based upon good cause shown in open court. The facts fall well within the constitutional standard of right to a speedy trial, the Utah statute, and Utah case law.

The judge did not abuse his discretion in granting the continuance. Regarding continuance, the United States Supreme Court has stated that it "is traditionally within the discretion of the trial judge. . . ." *Ungar v. Sarafite*, 376 U. S. 575, 589 (1964).

The states are in accord that continuance in a criminal matter is within the discretion of the trial court and shall not be disturbed unless exercise of the discretion has been prejudicial to the substantial rights of the defendant. *Beets v. State*, 449 P. 2d 903 (Okl. Cr. 1969); *Lofton v. People*, 450 P. 2d 638 (Colo. 1969); *Morford v. State*, 395 P. 2d 861 (Nev. 1964); *People v. Douglas*, 392 P. 2d 964 (Cal. 1964); *Shelton v. Lamb*, 460 P. 2d 156 (Nev. 1969); *State v. Cochran*, 447 P. 2d 520 (N. M. 1968); *State v. Gager*, 370 P. 2d 739 (Hawaii 1962); *State v. Mathis*, 319 P. 2d 134, 7 U. 2d 100 (U. 1957); *State v. Polson*, 448 P. 2d 229 (Ida. 1969); *State v. Towner*, 446 P. 2d 719 (Kan. 1968).

The continuance granted in case at bar resulted in no prejudice to appellant, and was not an abuse of the court's discretion. Appellant was allowed to enter a guilty plea to a lesser crime than that with which he was originally charged. Commitment was on the guilty plea to the lesser crime, which resulted in a less severe sentence than would have been imposed had appellant been convicted for the crime charged. There was no prejudice to appellant because of the delay.

Furthermore, appellant cannot rightfully complain that he was not brought to trial within the ninety day period, where he pleaded guilty. Entering a guilty plea

waives right to trial. *McCarthy v. United States*, 394 U. S. 459 (1969).

CONCLUSION

The continuance was granted pursuant to the statute. Appellant was not prejudiced. Therefore, the court did not abuse its discretion in granting the continuance. The court had jurisdiction at the time it passed judgment and convicted appellant.

Furthermore, the facts of the case at bar place the case well within the constitutional standard regarding right to a speedy trial, and within Utah case law.

Thus, neither statutory nor constitutional rights were violated. The respondent, therefore, requests that the trial court's judgment be affirmed.

Respectfully submitted,

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